146 U.S. 619

RECORD, CASE No. 15,093.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1123.

JOHN Q. BROWN, AS ASSIGNEE OF LAFAYETTE AND E. B. BAXTER, PLAINTIFF IN ERROR,

vs.

THE MARION NATIONAL BANK OF LEBANON, KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JULY 29, 1892.

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1 COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 20th day of February, A. D. 1892—Chief Justice W. H. Holt and Judges Caswell Bennett and Joseph H. Lewis presiding.

J. Q. BROWN, Assignee of Lafayette Baxter & E. B. Baxter, Appellant & Pl'ff in Error,
vs.
MARION NATIONAL BANK, Appellee & Def't in Error.

Be it remembered that heretofore, to wit, on the 10th day of August, 1891, the appellant, J. Q. Brown, assignee of Lafayette and E. B. Baxter, by his attorneys, Rives & Spalding, filed in the office of the clerk of the Kentucky court of appeals a transcript of a record in words and figures following, to wit:

STATE OF KENTUCKY:

Marion Circuit Court, June Term, 1891.

Pleas before the Hon. Wm. E. Russell, judge of the Marion circuit court, at the court-house, in Lebanon, Marion county, Kentucky, had on the 17th day of June, 1891, A. D., in the action in said court styled J. Q. Brown, assignee, *vc.*, Lafayette Baxter & Ed. Baxter, plaintiffs, *vs.* The Marion National Bank, defendant.

2 J. Q. BROWN, Assignee, *vc.*, Lafayette Baxter and E. B. Baxter, Plaintiffs,
vs.
THE MARION NATIONAL BANK, Defendant.
} Petition in Equity.

Plaintiffs say that on the 28th day of Nov., 1890, Lafayette and Ed. Baxter severally conveyed all their estate save legal exemptions to plaintiff J. Q. Brown, in trust for their respective creditors, to be converted into money and distributed in accordance with the legal and equitable rights of each. Plaintiff Brown qualified duly as trustee and has in his hands, in process of settlement, the estates conveyed to him by his said coplaintiffs.

Defendant, The Marion National Bank, has been for many years and still is a corporation, organized and carrying on a banking business in the city of Lebanon, in Marion county, Kentucky, under and by virtue of the provisions of an act of Congress of the United States authorizing national banks. Plaintiff Lafayette Baxter, prior to October 24th, 1885, had borrowed from the defendant various sums of money, for which he had executed divers notes, with Plaintiff E. B. Baxter and one W. A. Baxter as his surities, and said notes had been from time to time renewed, until on the said 54th day of October, 1885, the several renewal notes then due were

-solidated and renewed with one note, signed by the same parties, for $4,990.00.

The last-mentioned note was from time to time renewed until April 29th, 1889, by the same parties, at which time, W. A. Baxter having died, the note intended as a renewal was executed
3 by Lafayette and E. B. Baxter alone for $4,500.00, due four months thereafter. All the aforesaid notes and renewals thereof stipulated to bear interest at a rate exceeding 6 per cent. per annum, then and now the highest rate of interest allowed by the laws of Kentucky, and at each renewal the usurious interest was calculated and included in the face of the several notes, thereby increasing the amount nominally due defendant from plaintiff Lafayette Baxter. Plaintiff Lafayette Baxter at various times had to his credit in defendant's bank funds which were by defendant appropriated as credits or payments on the notes then held by it and afterward renewed as aforesaid, and all said credits or payments should be applied to reduce the principle of the debt due from Lafayette Baxter, disregarding all calculations of interest at the usurious or illegal rate charged or at any rate. On April 29th, 1889, the date of the note for $4,500.00, most, if not all, of the amount then claimed by defendant to be due from plaintiff Lafayette Baxter was made up of interest calculated and charged at a rate exceeding that allowed by the laws of Kentucky, and if the execution of the said $4,500.00 note on that day by Lafayette & E. B. Baxter should be regarded as a payment of the note theretofore executed by Lafayette Baxter, E. B. Baxter, and W. A. Baxter, then plaintiff Lafayette Baxter thereby paid to defendant a large amount of usurious interest, and defendant is liable to plaintiff J. Q. Brown as assignee for double the amount of the interest so paid. Should said $4,500.00 note, however, be treated as merely a renewal of the former note and not a payment thereof, then the greater portion of said $4,500.00,
4 being composed of usurious interest as aforesaid, should be deducted from it before any part thereof should be paid.

On said $4,500.00 note, given April 29th, 1889, no interest has been paid, but the note was renewed from time to time by the same parties and for the same amount, the last renewal being for $4,500.00 and dated May 4th, 1890, due four months thereafter, and another seperate note for $4,300.50, the usurious interest at 7 per cent. per annum, was, on April 10th, 1890, executed by Lafayette and E. B. Baxter. Both of said last-mentioned notes stipulate for 7 per cent. per annum interest, are now held by defendant and asserted as claims against the estates of Lafayette and E. B. Baxter, in the hands of Plaintiff Brown as assignee. In addition to the foregoing, defendant holds two other notes, each executed by E. B. and Lafayette Baxter, one for $650.00, of date Sept'r 30th, 1890, and one for $1,225.00, of date July 25th, 1890, and both due four months after their respective dates. Both of said notes are by defendant asserted as claims against the trust funds in the hands of plaintiff Brown, and both contain stipulations for the payment of interest at a greater rate than allowed by the laws of Kentucky, and both were given as renewals of other notes before that time given by the same

parties and stipulating for a like usurious rate of interest. The other notes so renewed were renewals of still others, the two notes of of $1,225.00 and $650.00, above mentioned, being the last renewal notes of a long series evidencing the debt of E. B. Baxter to defendant, all of which were contracts for payments of a greater rate of interest than allowed by the laws of the State.

At each renewal the renewal notes were so written as to in-
5 clude the said usurious interest accrued and to accrue in the face of the notes, and by this means usurious interest on usurious interest has been added in until the two notes now held by defendant for $1,225.00 and $650.00 respectively are largely if not entirely composed of interest, which plaintiffs are under the obligation to pay. Plaintiffs have no memorandum of the dates or amounts of the several notes renewed, as here-before set out, or of the dates or amounts of the several payments thereon, and they cannot accurately state the amount of usury paid or the amount carried forward and included in the several notes now held by defendant, but plaintiffs say that Lafayette and E. B. Baxter relied on defendant to keep a correct account of the various transactions mentioned, which defendant undertook to do and now has sufficient memorandum and records of all said transactions to furnish accurate information of the same. Plaintiff asks that defendant be required to answer fully, disclosing the dates and amounts of the loans to each of plaintiffs Lafayette and E. B. Baxter, the dates and amounts of the several payments by them, the dates and amounts of the several notes renewed by them, and the rate of interest borne by each, together with the amount of the several notes renewed and the rate of interest borne by each, together with the amount of interest included in the face of each note so given, and also the amount of interest included in the face of each of the notes now held by it and against each of plaintiffs; they further ask that judgment be entered against defendant for double the amount of interest paid to it by each of plaintiffs Lafayette and E. B. Baxter, and that defendant be
6 required to enter credits on the notes now held by it for amounts equal to the interest included in their face, whether it had accrued before their respective dates or was to accrue thereafter, and that defendant be enjoined from collecting or demanding any interest on either of the several debts owing to it by plaintiffs if it should appear that any debt was so owing. Plaintiffs ask that this suit be consolidated with the suit of J. Q. Brown, as-ignee, *vc.*, *vs.* E. B. and Lafayette Baxter, *vc.*, Nos. 2013, in equity, now pending in this court for the settlement of the trust of plaintiff Brown. Plaintiffs pray for all proper, general, and special relief.

RIVES & SPALDING,
Att'ys for Plaintiff.

Plaintiffs annex to the foregoing petition these interrogatories, to be answered by defendant as provided by law, to wit:

Int. 1st. When was the debt created now evidenced by the note of Lafayette and E. B. Baxter for $4,500.00, of date May 4th, 1890, and what was the amount of the debt when created?

Int. 2nd. Answer the above question with reference to each of the three other notes now held by the Marion National bank against the two Baxters.

Int. 3rd. How much interest was included in the face of each original note and how much future interest was included in each renewal note?

Int. 4th. What were the amounts and dates of the several payments on each debt and what the dates and amounts of the several renewal notes?

RIVES & SPALDING,
Att'ys for Plaintiffs.

Amendment to Petition.

Plaintiffs, for their amendment to their foregoing petition,
7 state that the various contracts and stipulations for interest in excess of the rate authorized by the law of Kentucky were each knowingly made and entered into in each case at a rate known by defendant, and interest was charged in each case at a rate known by defendant at the time to be in excess of the legal rate.

RIVES & SPALDING,
Att'y- for Pl'ffs.

Amended petition filed April 25th, 1891.
B. J. LANCASTER, *Clerk.*

Endorsed: Petition and interrogatories filed, tax paid, and summons issued. April 21st, 1891. B. J. Lancaster, clerk.

Marion Circuit Court, June Term, 1891.

JUNE 10TH, 1891.

J. Q. BROWN, Assignee,
vs.
THE MARION NAT. BANK. } Order Filing Answer.

This day came the defendant, The Marion National Bank, by attorney, and produced its answer and answer to interrogatories filed, which are ordered to be filed.

Marion Circuit Court.

J. Q. BROWN, Plaintiff,
vs.
MARION NAT. BANK, Def't. } Answer.

The defendant, The Marion National Bank of Lebanon,
8 says that it is true that Lafayette Baxter had borrowed of defendant at various times in past years various sums of money, for each of which sums when borrowed he executed — said bank his note. The first of said borrowing by said Lafayette Baxter of defendant was June 9th, 1874—$482.30—some five years ago, viz., Oct., $24.85, and said Baxter's notes to defendant were all put into one

note and given to this defendant by said Laf'e Baxter for the sum of $4,990.50.

This note was then renewed by said Laf'e Baxter to defendant some nine times. The last three months were each for the sum of $4,500.00, as follows: April 29th, 1889; Nov. 1st, 1889; May 4th, 1890, and the interest on said note actually paid by said Laf'e Baxter to this defendant for the two years next before the institution of this suit, now the sum of $427.50, paid on said note thus, April 29th, 1889, $160.25; Nov. 1st, 1889, $160.25, and May 4th, $107.00. The last time said note was renewed was May 4th, 1890, on 4 months' time. It is not true that at the different times said note was renewed and at the times the notes were renewed that made up the said $4,500 note *at* six per cent. per annum was the highest rate allowed by the laws of Kentucky, because when the first of said dorrowing was done, which was in June, 1874, 10 per cent. per annum was allowed as a legal rate of interest that parties might contract to pay, and this continued as the legal rate of interest until Sept. 1st, 1876, when 8 per cent. per annum was substituted as the legal rate until April, 1878, when 6 per cent. per annum was adopted as the legal rate. It is not true that usurious interest was calculated and included in the face of the several notes each time they were renewed, nor should pay-
9 ments made by the said Laf'e Baxter on said different notes be applied so as to reduce the principle of the debts due from said Laf'e Baxter. Such payments, except those made in two years next before the institution of this action, should be applied to the extinguishment of the interest agreed and covenanted to be paid this defendant by said Baxter.

This defendant says that it is true that a considerable part of said $4,500.00 note executed May 4th, 1890, and on which defendant sued Laf'e and E. B. Baxter before said parties made their trust deed to plaintiff, is composed of interest calculated and charged at a rate exceeding 6 per cent. per annum, but not all of the interest exceeded rates not allowed by the laws of Kentucky as before stated nor is this defendant in any event liable to plaintiff, the trustee, for more than double the amount of interest actually paid by said Laf'e Baxter to defendant in the two years next before this suit was instituted *was instituted.* Said renewals were not a payment of anything or any amount. It is true this defendant holds a note for $430.50 of Laf'e and Ed. Baxter; this note was originally given for $402.25 and has been renewed three times, the last renewal being for $430.50, date April 10th, 1890, and nothing has been paid on this note. Defendant holds two other notes, one for $1,225.00, date July 25th, 1890, and another for $650.00, date Sept. 30th, 1890; both said notes are due four months after their respective dates. On these two notes E. B. Baxter was principle and Laf'e Baxter surety. Said $650.00 is an amount that represents a loan made by this defendant to Ed. B. Baxter in 1880, in March, and which has been renewed every four months
10 and accrued interest added in the note in the rate each time except on renewal in 1880, July 9th, $8.35 was paid as inter-

est, and on the last renewal, $15.00, Sep. 30th, 1890, interest was paid, and on the second renewal before that, Jan. 24, 1890, a like amount of $15.00 interest was paid, and these three payments of interest are all that have ever been made on said debt. Said $1,225.00 also represents a loan made by this defendant to said Ed. Baxter in 1880, and which has been renewed each four months up to last renewal. At many of these renewals the rate given would be increased by additional sums borrowed and added in with the interest. Nothing whatever has been paid on this note when 10 per cent. was the conventional rate of interest on aforesaid; this defendant did not charge said Baxter more than that rate nor was he charged more than 8 per cent. when 8 per cent. was the legal rate of interest in this State as before stated. Said note of $430.50 on Laf'e Baxter and Ed. Baxter is here filed, marked A, and said note for $1,225.00 on Ed. Baxter and Laf'e Baxter is herein filed, marked B, and said note for $650.00 on Ed. and Laf'e Baxter is here filed as part hereof and marked C, and said $4,500.00 note on Laf'e and Ed. Baxter is filed — an exhibit in the suit in Marion circuit court of this defendant against said obligors. Said notes and each of them are just, due, and unpaid, nor are said notes or either of them entitled to any offsets or discounts. Said notes contain the following usury and amounts charged over legal rates of interest *or* by the laws of Kentucky provided: On $1,225 note, $176.00; on $650.00 note, $47.00; on said $4,500.00 note,
11 235.00, and on said $430.00 $1,590; and defendant, having answered, prays to be dismissed with its costs.

ROWNTREE & LISLE, *Att'ys.*

Marion National bank, by J. M. Knott, says it believes the statements made in the foregoing answer are true.

J. M. KNOTT.

Subscribed to and sworn to before me by J. M. Knott this June 9th, 1891.

B. J. LANCASTER, *Clerk.*

Endorsed: Filed in court June 10th, 1891. B. J. Lancaster, clerk.

Marion Circuit Court.

J. Q. BROWN, Assignee,
vs.
MARION NATIONAL BANK. } Answer to Interrogatories.

The defendant, The Marion National Bank, for answer to the interrogatories propounded with the petition to defendant, says, in answer to interrogatory 1st, No. 1—

That the note of $4,500.00, Laf'e and Ed. Baxter, was made June 9th, 1874, and when first created was $482.30; note No. 3371, $430.50, was made May 3rd, 1889, and when first created was $402.25; note $650, E. B. Baxter, was made March 6th, 1880, and when first created was for $308.65; note $1,225, Ed. Baxter, was made Sept. 13th, 1880, and when created was for $198.40. In

$500.00 note is included $1,964.70, interest added in note and its various renewals, Sept. 15, 1874, $100.00; Nov. 3rd, 1883, $301.00; Feb'y 28th, 1885, $437.00; April 10th, 1885, $1,086.00,
12 and May 22nd, 1885, $1,200.00 were added, 473.50 interest paid in cash as follows: March 13th, 1884, $46.00; April 29th, 1889, $160.25; November 1st, 1889, $160.25; May 4th, 1890, $107.00. The following payments were made: $282.70, April 24th, 1887, and $306.00, Nov. 5th, 1888.

The interest payment of $160.25, April 29th, 1889, was note paid in cash, but was included in note $402.25, made May 3rd, 1889. Dates and amounts of payments and renewals of the $4,500.00 note are as follows:

Sept. 15th, 1874, $603.15; Jan. 15th, 1875, $624.70.
May 18th, 1875, $647.05; Sept. 20th, 1875, $670.00.
Jan. 22nd, 1876, $693.75; May 22nd, 1876, $718.65.
Sept. 25th, 1876, $744.35; Jan. 27th, 1877, $770.95.
May 29th, 1877, $797.55; Oct. 2nd, 1877, $822.60.
Feb. 5th, 1878, $845.75; June 7th, 1878, $870.00.
Oct. 10, 1878, $895.00; Feb'y 13th, 1879, $920.70.
June 16th, 1879, $946.50; Oct. 15th, 1879, $972.10.
Feb. 16th, 1880, $1,000.00; June 19th, 1880, $1,028.75.
Oct. 22nd, 1880, $1,058.00; Feb'y 25th, 1881, $1,084.50.
June 28th, 1881, $1,111.00; Oct. 31st, 1881, $1,138.50.
March 3rd, 1882, $1,167.25; July 23rd, 1882, $1,200.00.
Nov. 4th, 1882, $1,233.00; March 7th, 1883, $1,267.50.
July 10th, 1883, $1,303.00; Nov. 13th, 1883, $1,650.00.
March 13th, 1884, $1,650.00; July 16th, 1884, $1,697.00.
Nov. 18th, 1884, $1,745.50; Oct. 24th, 1885, $4,990.50.
April 24th, 1887, $4,777.00; Aug. 27th, 1887, $4,895.00.
Dec. 29th, 1887, $5,016; May 2nd, 1888, $5,141.00.
Sept. 5th, 1888, $5,201.00; Nov. 5th, 1888, $4,732.00.
April 29th, 1889, $4,500.00; Nov. 1st, 1889, $4,500.00.
13 May 4th, 1890, $4,500.

From June 9th, 1874, to Sept. 1st, 1876, legal rate was 10 per cent., and it was the rate charged by us from Sept. 1st, 1876, to April 1st, 1878. We charged 8 per cent., which was the legal rate.

In the $1,225.00 note (E. B. Baxter) and its various renewals is included $576.28 interest. No interest on this note was paid. May 31st, 1883, $143.17 and Feb. 6th, 1884, $306.15 were added to it, besides interest as stated above. The dates and amounts of renewals are as follows:

Sept. 13th, 1880, $198.40; Jan. 14th, 1881, $204.00.
May 17th, 1881, $209.00; Sept. 20th, 1881, $214.00.
Jan. 21st, 1882, $220.00; May 23rd, 1882, $227.00.
Sept. 25th, 1882, $234.00; Jan. 28th, 1883, $241.50.
May 31st, 1883, $394.75; Oct. 3rd, 1883, $406.00.
Feb. 1st, 1884, $738.00; June 11th, 1884, $760.00.
Oct. 14th, 1884, $782; Feb. 17th, 1885, $805.00.
June 25th, 1885, $828.88; Oct. 23rd, 1885, $852.00.
Feb'y 26th, 1886, $902.00; Nov. 1st, 1886, $927.00.
March 4th, 1887, $953.00; July 5th, 1887, $978.00.

Nov. 10th, 1887, $1,003.00; March 13th, 1888, $1,028.50.
July 12th, 1888, $1,054; Nov. 13th, 1888, $1,080.00.
March 14th, 1889, $1,107; July 17th, 1889, $1,135.00.
Nov. 19th, 1889, $1,164; March 22nd, 1890, $1,194.
July 25th, 1890, $1,225.00.

On the $650 note (E. B. Baxter) and its various renewals is included $324.70 interest, and there was paid $38.65 interest in cash, $8.35 July 9th, 1880, $15.00 Jan'y 24th, 1890, and $15.00 Sept. 30th, 1890. There was a payment, $15.00, made on the
14 principle. Dates and amounts of its renewals are as follows:
July 9th, 1880, 307.00; Nov. 12th, 1880, $315.50.
March 5th, 1881, $324.00; July 20th, 1881, $332.50.
Nov. 22nd, 1881 $341 00; March 23rd, 1882, $350.00.
July 24th, 1882, $360.00; Oct. 27th, 1882, $370.00.
March 30th, 1883, $380.00; Aug. 2nd, 1883, $390.00.
Dec. 5th, 1883, $401.00; April 8th, 1884, $412.00.
Aug. 11th, 1884, $423.50; Dec. 14th, 1884, $436.00.
April 17th, 1885, $449.00; Aug. 20th, 1885, $462.00.
Dec. 23rd, 1885, $475.00; April 26th, 1885, $488.50.
Sept. 2nd, 1886, $502.50; Jan. 4th, 1887, $516.50.
May 7th, 1887, $531.00; Sept. 10th, 1887, $546.00.
Jan. 12th, 1888, $560.00; May 12th, 1888, $575.00.
Sept. 14th, 1888, $590.00; Jan. 16th, 1889, $605.00.
May 18th, 1889, $620.00; Sept. 21st, 1889, $625.00.
Jan. 24th, 1890, $650.00; May 27th, 1890, $665.00.
Sept. 30th, 1890, $650.00.

On $430.50 (Laf'e Baxter) note is included $28.25 interest; no interest paid in cash. The dates and amounts of renewals are as follows:

Aug. 6th, 1889, $10.00; Dec. 7th, 1889, $420.00.
April 10th, 1890, $430.50.

The said following amounts, $100.00, Sept. 15th, 1874; $301.00, Nov. 3rd, 1883; $437.00, Feb'y 28th, 1885; $1,086, April 10th, 1885; $1,200.00, May 22nd, 1885, of additional sums borrowed were added in the rate at different times until in and after Oct. 24th, 1885, there was only one note for said different loans. I have answered interrogatories 2, 3, and 4 in above answer to interrogatory No. 1.

MARION NATIONAL BANK,
By J. M. KNOTT, *Cashier.*

15 Sworn to and subscribed by J. M. Knott before me this June 9th, 1891.

B. J. LANCASTER, *Clerk.*

Endorsed: Filed in court June 10th, 1891. B. J. Lancaster, clerk.

Marion Circuit Court, June Term, 1891.

JUNE 16TH, 1891.

J. Q. BROWN, Assignee,
—
THE MARION NATIONAL BANK. } Order Filing Amended Answer.

This day came defendant, by att'y, and produced his amended answer, which is ordered to be filed.

Marion Circuit Court.

J. Q. BROWN, Assignee,
vs.
THE MARION NATIONAL BANK. } Amended Answer.

Defendant, The Marion National Bank, hereby amends its answer herein and says that it denies that all of said note for $430.50 was executed for usurious interest, as stated in the petition. Said note was originally given for $402.75, May 3rd, 1889; of this, $160.25, interest credited April 29th, 1889, was for interest on $4,732.00 *dollar*-note. On May 14th, 1889, $232.00 was paid on said $4,732.00 note, which reduced it to $4,500.00; the $160.25 and $232.00 and
16 the interest on this note makes the $402.75 note.

MARION NATIONAL BANK,
By RO. & LISLE.

Endorsed: Filed in court June 16th, 1891. B. J. Lancaster, clerk.

The deposition of J. M. KNOTT, who, being duly sworn, says:

By COUNSEL FOR PLAINTIFF: On what note, for what time, at what rate was the interest calculated that made up the consideration for the $430.50 note of Mae 3rd, 1889, or the note of which it was a renewal, and which you say was originally $402.25, and when was said original note given?

Ans. On $4,500.00 note for 6 months, at 7 per cent. interest, $160.25 of it, and the balance, $232.00, was paid on note May 14th, 1889, and reduced it form $4,732 to $4,500.00.

By same: On July 9th, 1880, how much money was loaned E. B. Baxter as the consideration for the note of that note mentioned in your answer to interrogatories filed with that petition?

Ans. Three hundred dollars.

By same: How much money was loaned E. B. Baxter Sept. 13th, 1880, as the consideration for the note of that note of that date for $198.40, how much for adding $143.17 May 31st, 1883, and $306.15 Feb'y 6th, 1884?

Ans. $194.00 Sept. 13th, 1880; $139.40 May 31st, 1883; $299.50 Feb'y 6th, 1884.

By same: Was the excess of $24.25 of the note of June 7, 1878, over that of Feb'y 5th, 1878 (845.75), added in as interest for a time subsequent to June 7th, 1878? If so, at what rate?

17 Ans. Yes, and rate 8 per cent.

By same: On Nov. 3rd, 1883, how much money did Laf'e Baxter get as the consideration for adding $301.00 to the note which on July 10th, 1883, was for $1,303.00; how much for adding $437.00 Feb. 28th, 1885; $1,086 April 10th, 1885, and $1,200.00 May 22nd, 1885?

Ans. $289.50 Nov. 3rd, 1883. On June 26th, 1883, he got $160.00 and in Oct. 17th, 1883, 229.10, and interest added on this from time to time made $437.00 Feb. 28th, 1885; interest *was* charged was over 6 per cent. On Dec. 1st, 1883, he got $972.25, and interest was added over 6 per cent. from time to time, making $1,086.00 April 10th, 1885. On Jan. 13th, 1882, he got $419.85, and Sep. 1st, 1883, he got $583.50, and interest added from time to time, making $1,200.00 May 22nd, 1885; rate charged was over 6 per cent.

By same: What was added to the $745.50 note, of date Nov. 14th, 1884, and included in the note for $4,990.50, of date Oct. 24th, 1885, besides the $437.00, $1,086.00, and $1,200.00 mentioned in last proceeding answer?

Ans. Interest on note some months before Oct. 24th, 1885, and after Oct. 24th, 1885, to April 24th, 1887.

J. M. KNOTT.

Endorsed: Received from the hands of W. J. Lisle and filed this June 16th, 1891. B. J. Lancaster, clerk.

Marion Circuit Court, June Term, 1891.

JUNE 17TH, 1891.

18 J. Q. BROWN, Assignee,
vs.
THE MARION NATIONAL BANK. } Judgment.

This action having been called, it was agreed by the parties that the action might be submitted for adjudication as though the pleadings had been made up ninety days; and, the action having been accordingly submitted for adjudication, *and* the court, being sufficiently advised, adjudges as follows: It appears from the pleadings and proof that within two years from the institution of this action the following sums were paid to said bank by said obligors on said three notes named in the pleadings at a greater rate of interest than 6 per cent., to wit: On said $4,500.00 note, $160.25 paid Nov. 1st, 1889, and $107.00 paid May 4th, 1890, and on said $650 note $15.00 was paid Jan. 24th, 1890, and $15.00 Sept. 30th, 1890, making in all said interest so paid $297.25; and it is adjudged that, as a penelty for the taking said interest, said trustee shall recover of said bank twice the amount of said interest, to wit, the sum of $514.50, five hundred and fourteen dollars and fifty cents, and his costs herein expended; and, it farther appearing that each of said three notes on their respective faces bear interest at the rate of seven per cent. per annum, it is adjudged that the entire interest which each of said notes carries, to wit, 7 per cent. on each note form the time as by its face and terms

it bears, *7 per cent.* shall be forfeited and the face of each of the said notes only, namely, $4,500.00, 430.50, $650.00, $1,225.00, shall be held as *value*, legal, and subsisting obligations which said bank
19 may present — prove against the estate of the respective obligors for payment *pro rata* or in full, as the case may be. To so much of above judgment as forfeit- only the interest accruing on the face of said notes and refuses to forfeit the interest including in the amounts for which said notes were given, namely, $4,500, 430.50, $650.00, and $1,225.00, and to the refusal of the court to give double the amount of $160.25, interest on the $4,500.00 note paid April 29th, 1889, and included in the $430.00 debt, plaintiff excepts and prays an appeal to the court of appeals, which is granted him. This action is consolidated with that of said Trustee Brown *vs.* E. B. and Laf'e Baxter, in this court.

Certificate.

I, B. J. Lancaster, clerk of the Marion circuit court, certify that the foregoing 19 pages and one page index, making in all 20 pages, contain a full and complete copy of all papers filed and orders made in the case of J. Q. Brown, assignee, *vs.* The Marion National Bank, as now appears from the records in my office.

Given under my hand this June 29th, 1891.

(Signed) B. J. LANCASTER,
Clerk Marion Circuit Court.

20 On the foregoing transcript was the following endorsement:
"Court of appeals of Ky. J. Q. Brown, assignee, &c., appellee. Appeal from judgment of Marion circuit court, rendered at its June term, 1891. Record, page 18. No summons. Rives & Spalding, counsel for appellant."

Afterwards, at a court of appeals held in and for the Commonwealth of Kentucky, at the capitol, in Frankfort, on the 10th day of October, 1891, the following order was entered:

BROWN, Ass'ee,
v.
MARION NATIONAL BANK.

On motion of the appellee, by counsel, a cross-appeal is granted herein, and it is ordered that the cause be submitted.

Afterwards, at a court of appeals held as aforesaid on the 20th day of February, 1892, the following orders and judgments were entered herein, to wit:

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed on the original appeal and affirmed on the cross-appeal and cause remanded for further proceedings consistent with the opinion herein, which is ordered to be certified to said court.

It is further considered that the appellant recover of the appellee his cost herein expended.

At the same time the court delivered the following opinion:

21 Appellant Brown, to whom a deed of trust was made by L. & E. Baxter for benefit of creditors, brought this action under sections 5197, '8, Rev. Stats. U. S., to recover back from appellee, Marion National bank, twice the amount of interest paid on certain promis-ory notes.

He had previously instituted another action for settlement of estates of the insolvent debtors and distribution of assets among creditors, in which appellee had presented and filed the notes mentioned for payment, and the two actions appear to have been consolidated and the questions arising in each between parties to this appeal were determined by the judgment now before us for revision.

That judgment was in substance for twice the amount of $297.25, made up of the following-recited sums paid as interest on two notes within two years prior to institution of first-mentioned action at a greater rate than 6 per cent., to wit: On note for $4,500, $160 paid November 1, 1889, and $107 paid May 4, 1890, and on a note for $650, $15 paid Jan'y 24, 1890, and $15 Sept. 30, 1890.

It was at the same time farther adjudged that the entire interest carried by the several notes filed be forfeited, as 7 per cent. per annum appears upon faces of each as the rate charged and that only the principal is payable out of the trust estate.

The judgment was at the time excepted to by plaintiff, now appellant, because, first, $160.25, interest paid April 29th, 1889, on the note for $4,500, is not included; second, only interest on the

22 several notes is adjudged forfeited, whereas all that had accrued previous to respective dates of and included in the amounts of them should have been. Appellee on cross-appeal seeks reversal because entitled to interest at 6 per cent. not allowed from date of the judgment.

By sec. 5197 each national bank is authorized to take and charge interest at the rate allowed by law of the State where it is situated, and sec. 5198 is as follows: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceeding section when knowingly done shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it or which has been agreed to be paid thereon. In case the greater rate of interest has been paid the person by whom it has been paid or his legal representative may recover back in an action in the nature of an action for debt twice the amount of interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

Although there were four notes upon each of which a greater rate of interest than allowed in this State, which is 6 per cent., is alleged to have been paid, judgment was rendered for that charged by and paid to appellee on two only; but as no exception was taken, nor any complaint is now made of the apparent omission, we must as-

sume there is no error on that account. We think, however, appellant is entitled to judgment for twice the amount of $160.25 paid April 29, 1889, on the note for $4,500 in addition to the sums recited, for the action appears to have been commenced April 25,
23 1891, within two years after the payment, and it is expressly admitted in the answer of appellee. But the other exception seems to us not well taken, for, according to the evident meaning of the section quoted, taking, receiving, or charging by a national bank in this State a rate of interest greater than 6 per cent. is to be deemed a forfeiture of the entire interest which an existing note, bill, or other evidence of debt carries with it or which has been agreed to be paid thereon; not such interest as may have been carried with or agreed to be paid on a note already cancelled either by payment or by renewal, whereby what was before interest has become interest-bearing principal.

The usury law of this State is no guide in construing the statute under consideration, because entirely different. The section quoted was intended to accomplish two distinct objects, neither of which is authorized by statute of this State: one is to forfeit and bar recovery of all interest carried by or agreed to be paid on any note, bill, or other evidence of debt sued on or presented for payment out of the estate of a decedent or insolvent debtor, where the rate may be greater than is allowed by law, and the other to give to the debtor who has already paid such greater rate the right to recover back twice the amount thereof, whether so paid on one or more notes or bills or upon one still in existence or fully paid off and cancelled, provided such action is commenced within two years after such usurious transaction.

There is no difficulty in understanding — meaning of the last clause of the section, nor need there be any in properly in-
24 terpreting and applying language of the first, for interest that has been either paid off or become by renewal part of the principal of a new note cannot be fairly regarded as being carried as interest with it, much less can it be with propriety said to have been agreed to be paid on it.

By the judgment appellee was authorized to prove and present against the estate held by appellant in trust the demands of which the notes in question are evidence and to receive *pro rata* the amount thereof, less interest. Such demands when evidenced by judgment therefor or, what is equivalent, when reported to court and allowed of course bear interest, but not before; and as the judgment in this case is not inconsistent with such view it must be affirmed on cross-appeal, but, for the reason indicated, reversed on the appeal and remanded for farther proceedings.

And afterwards, at a court of appeals held as aforesaid on the 10th day of March, 1892, the following order was entered herein:

The appellant, by counsel, filed a petition and moved the court for a rehearing herein, and the cause is submitted on the said motion.

The following is the petition filed by the foregoing order:

Court of Appeals of Ky.

J. Q. BROWN, Assignee, &c., *vs.* MARION NATIONAL BANK. } Petition for Rehearing.

25 After a careful study of the opinion rendered February 20th, 1892, we are convinced that the court overlooked important principles and controlling decisions, to which we feel constrained by a sense of duty to the court, as well as to our client, to again call your attention.

The exact questions involved are perhaps new in this State, but the learning of other State courts has shed light upon them, and the Federal Supreme Court has, as we conceive, settled them against the position taken by this court in this case.

In so far as concerns the application of the State statute to national banks, it is undeniably true, as this court says, that "the usury law of this State is no guide in construing the statute under consideration, because entirely different;" but it would seem that the general principles applied by the courts to the construction of usury statutes ought not to be disregarded merely because the particular statute was different only in the penalties denounced from the act of Congress now under consideration. This court, having considered the act of Congres without reference to other adjudications (so far as can be seen from the opinion) and looking alone to its wording, says: "According to the evident meaning of the section quoted, taking, receiving, or charging by a national bank in this State a rate of interest greater than six per cent. is to be deemed a forfeiture, not of such interest as may have been carried with or agreed to be paid on a note already cancelled, either by payment or by renewal, whereby what was before interest has become interest-bearing principal." It is evident from the statute that if the
26 note is cancelled by payment the debtor may, as against the bank, enforce a penalty of double the amount of interest the note may have carried with it; yet by the opinion rendered the bank is not only saved from that penalty, but awarded the machinery of the courts to collect the interest if, instead of paying at once, a new promise is made to pay the amount with interest compounded. The court went further and authorized the bank in this case to prove their claims, not alone for the interest that had been carried by the notes renewed, but for interest accruing after the execution of the notes now in question, calculated for four months and included in their face. Neither of these notes has ever been cancelled, either by renewal or payment; yet if the opinion stands, appellant must pay that interest, because his assignors promised to pay it, after a calculation of amount was made, instead of promising, before the calculation was made, to pay at a certain rate per cent. and calling it interest.

This act of Congress is operative in every State of the Union, and that its operation may be uniform it is necessary for the State courts to accept as authoritative the construction given by the U. S. Su-

preme Court, at least to the same extent that the local construction of State statutes is binding on Federal courts.

We fear this court has overlooked the fact that the U. S. Supreme Court, in Bank *vs.* Dearing, 91 U. S., 29, has given to the statute in question a construction different from that which seemed evident to your honors. In that case Dearing had executed his note
27 to Deitmar for $2,000.00, payable one month after date, under an agreement that the bank would discount it. The bank received the note and paid to Dearing $1,981.67, reserving, as discount from the face of the note, $18.33. Mr. Justice Swayne, in concluding the opinion of the court, said: "The plaintiff below (the bank) was entitled to recover the principal of the note sued on, less the amount of interest unlawfully reserved," thus clearly recognizing the distinction between the face of the note; which includes interest, and the principal, which may be recovered—a distinction which this court evidently overlooked.

In the leading case of Barnet *vs.* National Bank, 98 U. S., 555, the circuit court for the southern district of Ohio had overruled a demurrer to the defense "that the bill in suit was the last of eight renewals; that illegal interest was taken upon the series to the amount of $1,116.00, which it was claimed should be applied as a payment upon the bill in question." A demurrer was sustained to two other defenses on the ground that each alleged actual payment of the usurious interest. A clear distinction was made between a payment and a renewal note, including the usurious interest in its face. In the latter case the amount of the usury so included could not be collected.

The judgment of the circuit court was affirmed. The Supreme Court, in construing the statute, said: "Two categories are thus defined and the consequences denounced:

"1. Where illegal interest has been knowingly stipulated for but not paid, there only the sum lent, without interest, can be recovered.

28 "2. Where such illegal interest has been paid, then twice the amount so paid can be recovered, &c., &c." If not paid, the Federal courts will not compel its payment, whether the stipulation for its payment assume one form or another; whether it be a promise to pay it, as interest by name, or whether it be included in a series of renewals.

The Federal courts do not and we believe this court after mature consideration will not hold that usury, the collection of which is forbidden and whose payment subjects the receiver to a penalty of twice the amount, could in any case be a valid consideration for a note or promise given for its payment in whole or part, or that the act of Congress aimed to suppress usury evidently requires such a construction. If it does or if such a construction is permissible, the statute is a snare and a delusion, for in every case of loans by national banks interest is added in the face of the note for the time it has to run, and a stipulation for interest as interest only after maturity. They would omit the stipulation for interest after maturity and would require prompt renewals, in order to avoid the

fateful word "interest." It has been said that "a rose by another name would be as sweet, &c.," and to national banks as to other money-lenders interest or pay for the use of money, which is called not "interest," but "commission," "discount," "principal," or any other name, would be equally acceptable.

We cannot see the magic in the word "interest," nor can we believe it was the word rather than the substance that Congress had in view, or that a change of name would or should
29 render the statute inoperative.

In Driesback *vs.* National Bank, 104 U. S., 52, which was a suit on the last of a series of renewals, it appeared that at each renewal the interest had been actually paid, and the court reaffirmed the decision in the Barnet case and the construction of the act then given, Chief Justice Waite saying: "The claim is not for interest stipulated for and included in the note sued on, but for the application of what has actually been paid as interest."

The meaning is clear that if the interest had not been paid, but included in the various renewals and carried on into the note sued on, which was the last, the forfeiture would have been applied and the collection of it forbidden by the court.

The statute itself, in the clause immediately following the portion we have been considering, shows that the forfeiture was not intended by Congress to be restricted to interest denominated by the parties as interest or to the interest accruing on the face of the bill or note which should be the evidence of the loan; "but the purchase, discount, or sale of a *bona fide* bill of exchange payable at another place than the place of such purchase, discount, or sale at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest, &c." The purchase or discount of a note payable at the place of purchase or discount at a greater rate than legal interest was certainly considered by Congress
30 as "taking, receiving, or reserving" within the forfeiture clause, even though the face of the note might not call for interest as "interest."

If it is illegal to agree to pay or receive interest or compensation for the use of money when it is stipulated for at a given rate per cent., we cannot see what principle of construction could make it legal if the calculation of the amount at the given rate be made in advance and the promise be to pay the lump sum, nor do we believe that this court will so hold, or that usury can be a good consideration to uphold a promise to pay it, whether that promise be the first, second, tenth, or twentieth.

We respectfully ask a careful reconsideration of the questions involved and a rehearing of the case.

Respectfully submitted.

RIVES & SPALDING,
Counsel for Appellant.

Authorities cited:

91 U. S., 29, Bank *vs.* Dearing.
98 U. S., 555, Barnet *vs.* Nat'l Bank.
104 U. S., 52, Driesback *vs.* " "

And afterwards, at a court of appeals held as aforesaid on the 24th day of March, 1892, the following order was entered herein:

The court being sufficiently advised, it is considered that the petition for a rehearing herein be overruled.

The plaintiff in error filed writ of error on June 11th, 1892, in the clerk's office of the court of appeals, which is as follows:

31 UNITED STATES OF AMERICA, } ss:
District of Kentucky, }

The President of the United States of America to the judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, and also in the rendition of a judgment of a plea which is in the said court of appeals pending, before you, between John Q. Brown, as assignee of Lafayette and E. B. Baxter, plaintiff, and The Marion National Bank of Lebanon, Kentucky, defendant, a manifest error hath happened, to the great damage of the said John Q. Brown, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of the next October term of the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and the custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Frankfort, in said district, this 8th day of June, A. D. 1892, and of the Independence of the United States the 116th.

Seal 6th Circuit Court, Ky. Dist., U. S. of America.

W. J. CHINN, JR.,
Clerk U. S. Circuit Court, Ky. Dist.

Writ of error allowed by—

WM. H. HOLT,
Ch. Justice of Ky.

32 The plaintiff in error filed in the said clerk's office his assignment of errors in words and figures following, to wit:

Assignment of Errors.

UNITED STATES OF AMERICA, *District of Kentucky,* } *ss:*

In the Matter of JOHN Q. BROWN, plaintiff, *vs.* THE MARION NATIONAL BANK, defendant in error.

Plaintiff assigns for error the following, viz:

The court of appeals of Kentucky in said case erred in holding that the forfeiture of interest denounced in section 5197–'98 of the Revised Statutes of the United States does not apply to interest accrued upon a series of notes, each a renewal of another and all given as evidence of the same loan, where the interest has been calculated in advance and included in the face of the notes, but never paid.

The court of appeals erred in permitting appellee to prove the amount of the face of each of its four notes against the estates of the Baxters in the hands of appellant, when each of said notes was made up in part of interest, calculated in advance, for a period of time subsequent to its date, and in part of interest which had been so calculated on notes, of which the notes in suit were renewals.

The court of appeals erred in holding that a national bank could avoid the penalty and also the forfeiture denounced in said statute by obtaining a new promise for the payment of the usury, and could, on said new promise, maintain an action and recover by law what the statute has denounced as illegal—in effect, holding that usury, though illegal, is a valid consideration for a promise to pay it, provided that promise is not the first promise made.

Respectfully submitted.

RIVES & SPALDING,
Att'ys for Appellant.

Filed in clerk's office of court of appeals June 10, 1892.

33 COMMONWEALTH OF KENTUCKY, *Court of Appeals,* } *sct:*

I, Abram Addams, clerk of the Kentucky court of appeals, certify that the foregoing thirty-two pages contain a true, full, and complete transcript of the record and proceedings had in said court in the case of J. Q. Brown, assignee, appellant, against Marion National Bank, appellee, as appears of record and on file in my office.

Seal Kentucky Court of Appeals.

In testimony whereof I have hereunto set my hand and affixed the seal of my office.

Done at Frankfort, Kentucky, this 11th day of June, A. D. 1892.

ABRAM ADDAMS,
Clerk of Kentucky Court of Appeals.

Fee for this transcript, $12.20.

34 UNITED STATES OF AMERICA, } ss:
District of Kentucky, }

To the Marion National Bank of Lebanon, Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington on the — day of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of Kentucky. wherein John Q. Brown, as assignee of Lafayette and E. B. Baxter, is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable William H. Holt, chief justice of the court of appeals of Kentucky, this 10 day of June, in the year of our Lord 1892.

WM. H. HOLT,
Ch. Justice of Kentucky.

35 Formal service of this citation is hereby waived and appellee hereby enters its appearance as defendant in error in this case in the Supreme Court of the United States this June 13th, 1892.

MARION NAT. BANK OF LEBANON,
By H. J. LISLE, *Att'y.*

Endorsed on cover: Case No. 15,093. Kentucky court of appeals. Term No., 1123. John Q. Brown, as assignee of Lafayette and E. B. Baxter, plaintiff in error, *vs.* The Marion National Bank of Lebanon, Kentucky. Filed July 29th, 1892.

Office Supreme Court U. S.
FILED,
SEP 27 1892
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

JOHN Q. BROWN, ASSIGNEE, &C., PLAINTIFF IN ERROR,

vs.

THE MARION NATIONAL BANK OF LEBANON, KY., DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF OF RIVES & SPALDING, FOR PLAINTIFF IN ERROR.

T. L. BURNETT,
H. M. LANE,
} Of Counsel.

ENTERPRISE CO., PRINTERS, LEBANON, KY.

SUPREME COURT OF THE UNITED STATES.

JOHN Q. BROWN, ASSIGNEE, &C., PLAINTIFF IN ERROR,

vs.

THE MARION NATIONAL BANK OF LEBANON, KY., DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

The questions presented in this case arise under the 30th Section of the Act of Congress of June 3, 1864, known as the National Bank Act.

"* * The knowingly taking, receiving, reserving or charging a "rate of interest greater than aforesaid shall be held and adjudged to be "a forfeiture of the entire interest which the note, bill, or other evidence "of debt, carries with it, or which has been agreed to be paid thereon; "and in case a greater rate of interest has been paid, the person or per-"sons paying the same, or their legal representatives, may recover back "in any action of debt, twice the amount of interest thus paid from the "association taking or receiving the same; PROVIDED, that such ac-"tion is commenced within two years from the time the usurious tran-"saction occurred." *Revised Statutes U. S., Secs.* 5197-98.

On April 21, 1891, Plaintiff in Error, as Assignee for the benefit of creditors of Lafayette and E. B. Baxter, together with his Assignors, instituted this suit against Defendant in Error under the second clause of the statute quoted, to recover the penalty of twice the amount of interest paid by the Baxters on several debts owing by them, and on which usurious interest had been paid to Defendant in Error, within two years prior to the institution of the suit.

It was also alleged that Plaintiff in Error had, before that time, instituted suit in Equity in the Marion Circuit Court for the settlement of his trust as Assignee, for an ascertainment of creditors, and for distribution of the assets in his hands; that Defendant in Error was asserting against the estate of the Assignors four separate claims evidenced by

notes for $4,500.00, $1,225.00, $430.00 and $650.00, respectively; that each note, in its face, contained a large amount of usurious interest, each being the last of a series of renewal notes, on which interest had not been paid but carried forward and included in the face of the new notes; a consolidation of the two actions was asked, and an order enjoining Defendant in Error from collecting or demanding any interest on the amount of the several loans.

The Circuit Court refused to declare a forfeiture of any of the interest included in the face of either of the notes, but decreed that each one should be presented and proven against the estate of the Baxters in the hands of their Assignee, Plaintiff in Error, for the full amount of the face of each; forfeiting only the interest accruing on each note from the time as by its face and terms it carried with it, to-wit: the seven per cent. interest on the face of each from its maturity.

On appeal to the Court of Appeals of Kentucky this portion of the judgment of the Circuit Court was affirmed, and from that judgment of affirmance the Assignor, Brown, has sued out a Writ of Error to this Court and assigns the following

SPECIFICATIONS OF ERROR:

The State Court erred in holding that the forfeiture of interest denounced in Secs. 5197-98, of the Revised Statutes, does not apply to interest accrued upon a series of notes, each a renewal of another, and all given as evidence of the same loan, where the interest has been calculated in advance and included in the face of the notes but never paid.

Also in permitting Defendant in Error to prove against the estate of the Baxters the amount of the *face* of each of its four notes, when each of said notes was made up in part of interest, calculated in advance for a period of time subsequent to its date, and in part of interest which had been so calculated on other notes of which those in suit were renewals.

The State Court also erred in holding that a National Bank could avoid the penalty, and also the forfeiture denounced in the Statute by obtaining a *new promise* for the payment of usury, and could, on that new promise, maintain an action, and recover by law what Congress had denounced as illegal—In effect holding, that usury, though illegal, is a valid consideration for a promise to pay it, in defiance of the Statute, provided it be not the first promise made.

ARGUMENT.

The act of Congress referred to is penal in its nature, but it is also a remedial Statute, acting upon the offense by setting aside the forbidden transaction, and should therefore be liberally construed to effect the object which Congress had in view in enacting it. *I. Blackstone*, 88. *Potter's Dwarris*, 260. *Farmers' National Bank vs. Deering*, 91 *U. S.*, 35.

It is operative alike in every State of the Union, and that its operation may be uniform it is necessary for the State Courts to accept as authoritative the construction given to it by this Court, although its provisions may be enforced in the State Courts, and the form of procedure is regulated by the local rules of practice. *Bank vs. Deering, supra. Bletz vs. Columbia National Bank*, 30 *Am. Rep.*, 343.

The Statutes of the State upon the subject of usury need not be considered, the *rate* of interest chargeable by each bank being that allowed by the State (in Kentucky six per cent. per annum), but the consequences of an excessive charge not being affected by local laws upon the subject. *Bank vs. Deering supra. Barnett vs. National Bank*, 98 *U. S.*, 555.

In considering the Statute, such a construction should be given as will effectuate the purpose of its enactment, and even the letter of the law "should not be permitted to kill the spirit of it, the will of the "Legislature and not the words used by it, must control." *Barbour vs. City of Louisville*, 83 *Ky.*, 103. *Harrison vs. Commonwealth*, 83 *Ky*, 162. *Wilson vs. Donaldson*, 10 *Am. St. Rep.*, 48, *and note* 53.

The Court of Appeals of Kentucky, in its opinion in this case (*Record page* 13), say that "According to the evident meaning of the "section quoted, taking, receiving, or charging, by a National Bank in "this State, a rate of interest greater than six per cent. is to be deemed "a forfeiture of the entire interest which an *existing note*, bill or other "evidence of debt carries with it, or which has been agreed to be paid "thereon; not such interest as *may have been* carried with or agreed to "be paid on a note already cancelled either by payment or *by renewal*, "whereby what was before interest has become interest-bearing principal."

For this proposition no authority is cited, and no reason assigned other than that such a construction was, to the mind of the Court, *evidently* correct. We have been unable, either from the wording of the Statute, its object, or the adjudications upon it to find the evidence that appeared to the minds of our learned State Court.

It has been the settled policy of the Federal Government, as of nearly every State in the Union, to prevent an exorbitant interest or profit for the use of money loaned. Usury, according to Mr. Tyler in his work on the subject (*page* 35), is the taking of "more for the use of money than the law allows," and it is a familiar principle in the construction of such laws that any device, resorted to for the purpose of evading the usury laws and obtaining illegal interest on a loan, will be closely scrutinized, the intent of the parties ascertained, and the laws against usury applied.

A sale of bank stock, of land, or of personal property, a sale or exchange of securities, or any other device to cover up a usurious transac-

tion, will be probed and the Statute applied when the circumstances are such as to induce the belief that the particular form of the transaction was designed to evade the Statute. The general rule is that, as between the original parties, where a security is affected with usury, any other security substituted therefor is likewise affected. *Rudd vs. Planters' Bank*, 78 *Ky*, 513, *and cases collated in note to Davis vs. Garr*, 55 *Am. Dec.*, 397.

If the construction given by the Court of Appeals of Kentucky were permissible, the act of Congress is a snare and a delusion; every bank would abandon the word "interest," and the substance, or pay for the use of money loaned, would be called *principal*, and included in the face of each note.

We can not see the magic in the word "interest," nor can we believe it *evident* that Congress had in view the word rather than the substance, or that such a construction should be given to the Statute as to render it practically inoperative. A debtor who actually pays usurious interest in advance may recover twice the amount on account of the illegality of the transaction, but if the judgment in this case is correct, when he merely agrees to pay it, and signs a note in which it is included along with the amount borrowed, the law would compel him to pay it; in such case a pertinent inquiry would be, can he, after paying it under judgment of the Court, bring his penal action and recover twice the amount under the second clause of this act?

We have been unable to see any reason for a distinction between a case where interest is calculated in advance and the amount included in the face of the note, and one where the rate only is specified, leaving the calculation of amount to be made at a future time; nor, if the latter is illegal as was held in this case, can we see how another promise to pay it after the calculation is made can remove the taint.

The Statute itself, in the clause immediately following the portion we have been considering, shows that the forfeiture was not intended by Congress to be restricted to interest denominated by the parties as "interest," nor to the interest accruing on the *face* of the particular bill or note which may be at the time the written evidence of the loan; "But the purchase, discount or sale of a *bona fide* bill of exchange pay-"able at another place than the place of such purchase, discount or sale, "at not more than the current rate of exchange for sight drafts, in addi-"tion to the interest, shall be considered as taking, or receiving a greater "rate of interest, etc."

From this it would seem clear that Congress intended the forfeiture clause to apply to the purchase or discount of a note payable at the place of purchase or discount, at a greater rate than legal interest, even though the face of the note might be silent as to the word interest.

In the leading case of *Barnett vs. National Bank*, 98 *U. S.*, 555, the

Circuit Court for the Southern District of Ohio had overruled a demurrer to the defense "that the bill in suit was the last of eight renewals; "that illegal interest was taken upon the series to the amount of "$1,116.00, which it was claimed should be applied as a payment upon "the bill in question." A demurrer was sustained to two other defenses on the ground that each alleged *actual payment* of the usurious interest. A clear distinction was made between a *payment* of interest, and a *renewal note* including the usurious interest in its face. The judgment of the Circuit Court was affirmed, and this Court in construing the Statute said: "Two categories are thus defined and the consequences denounced:

"1st. Where illegal interest has been knowingly stipulated for but "not paid, then *only the sum lent*, without interest, can be recovered.

"2d. Where such illegal interest has been paid, then twice the "amount so paid can be recovered," etc., etc.

Until there has been an actual payment of interest no cause of action against the bank under the second clause of the act can arise, and the bank is not liable to the penalty; it may never receive the illegal interest agreed to be paid, and therefore the limitation of two years within which "such action may be commenced" applies only to the special action of debt for the penalty. This action is the only remedy of the debtor where the usurious interest has been actually paid, and limitation begins to run from the time of payment. *First National Bank of Peterborough vs. Childs*, 39 *Am. Rep.*, 474 (130 *Mass.*, 519,). *Driesback vs. National Bank*, 104 *U. S.*, 52. *Cook vs. Lillo*, 103 *U. S.*, 792. *Walsh vs. Mayer*, 111 *U. S.*, 31.

The first clause of the section is the one applicable to the case at bar; it provides not for a cause of action but for a defense, which can generally be pleaded only when the bank may attempt to collect its debt. In this case Defendant in Error is attempting to collect the amount of the face of four notes, in each of which is included interest accruing from its date to its maturity, in addition to a large amount of illegal interest on the original loan, which interest the Baxters had several times promised to pay, the last promise being made when the amount was calculated and included in the last renewal note. The note was a promise to pay as well the illegal interest included in its face as the original loan. If one promise to pay it was illegal, it is difficult to see on what principle two or a dozen consecutive promises can make it legal and enforcible.

In the case of *Bank vs. Deering*, 91 *U. S.*, 29, Deering had executed his note to Deitmar for $2,000.00 payable one month after date, under an agreement that the bank would discount it. The bank received the note and paid to Deering $1,981.67 reserving as discount from the face of the note $18 33. Mr. Justice Swayne, in concluding the opinion of this Court, said: "The Plaintiff below (the bank), was entitled to recover

"the principal of the note sued on, less the amount of interest unlaw-
"fully reserved," thus clearly recognizing the distinction between the face of the note when it is partially made up of interest added in, and the *principal*, or "*sum lent*" which may be recovered,—a distinction evidently overlooked by the Kentucky Court of Appeals.

In *Driesback vs. National Bank*, 104 *U. S.*, 52, which was a suit on the last of a series of renewals, it appeared that the interest had been actually paid at the time of each renewal, and not added in the face of the renewal note and another promise taken for its payment. Chief Justice Waite, holding to the rule laid down in the Barnett case, that when the interest was paid the action of debt was the exclusive remedy, said: "The claim is not for interest stipulated for and included in the "note sued on, but for the application of what has actually been paid "as interest." The meaning seems clear that had the interest not been paid but carried forward, from time to time as in the case at bar, and finally included in "the note sued on," the forfeiture would have been declared and the collection of all but the "sum lent" forbidden by this Court. It seems to us that on principle and authority this rule should be applied in the case at bar, the judgment of the State Court reversed, and Defendant in Error only permitted to prove against the trust estate the amount of its original loans to the Baxters, excluding all interest. Asking a reversal of the case for the reasons indicated, we most respectfully submit it to your Honors.

RIVES & SPALDING, for Plaintiff in Error.

T. L. BURNETT, H. M. LANE, } Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

JOHN Q. BROWN, AS ASSIGNEE OF LAFE AND E. B. BAXTER,
PLAINTIFF IN ERROR,

vs.

THE MARION NATIONAL BANK OF LEBANON, KY.,
DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR, BY W. J. LISLE, ATTORNEY.

ENTERPRISE CO., PRINTERS, LEBANON, KY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

JOHN Q. BROWN, AS ASSIGNEE OF LAFE AND E. B. BAXTER, PLAINTIFF IN ERROR,

vs.

THE MARION NATIONAL BANK OF LEBANON, KY., DEFENDANT IN ERROR.

Lafe and E. B. Baxter on the 28th day of November, 1890, assigned their property to Appellant in trust for the benefit of their creditors. At the time of their assignment they were indebted by notes to the defendant bank in the following sums: $430.50, with 7 per cent. interest from Aug. 9, 1890; $1,125.00, with like interest from Nov. 25, 1890; $650.00, with like interest from Jan. 30, 1891, and $4,500.00, with like interest from Sept. 4, 1890.

The $4,500.00 note was composed of some four other notes consolidated April 24, 1887, making $4,990.00. This note was renewed some nine times, and at its last renewal, May 4, 1890, it was $4,500.00, as stated above. Some payments had been made that reduced the note to the sum stated. One of said four notes was for $482.30, given July 9, 1874. This note before it was consolidated as stated was renewed thirty times. The others of the four notes consolidated, as well as the notes for $430.50, $1,225.00 and $650.00, were for sums borrowed from eight to ten years ago, and renewed from time to time. The $4,990.00 note was renewed some nine times after the consolidation. On said debt various payments were made on principal and interest, and at times when renewals were made additional sums of money were borrowed and incorporated in the renewed notes.

This action was brought by the assignee, Plaintiff in Error, to have enforced the United States Statutes on the subject of usury charged and collected by defendant as a National Bank, viz.: Plaintiff sought to have judgment against defendant for double the amount of sundry items of interest paid by plaintiff to defendant, and to have declared forfeited not only the interest called for on the face of each note, but such items

of interest as had been from time to time added in and incorporated in the notes on renewals, and to require Defendant in Error to enter credits on the notes now held by it for the amounts equal to the interest included on their face, whether it had accrued before their respective dates, or was to accrue thereafter, and that defendant be enjoined from collecting any of such interest.

The Trial Court in Kentucky adjudged appellee to pay to the plaintiff assignee double the amount of the interest actually paid in cash by the Baxters to defendant in the two years next before this suit was instituted, and also adjudged as forfeited all the interest the notes carried or bore on their face, that is that only the principal of each note should be paid, and this the Court of Appeals of Kentucky affirmed as correct, and this decision of the Supreme Court of that State is here for revision.

An act of the Kentucky Legislature, approved March 14, 1871, allowed ten per cent. per annum to be contracted for. By act of March 14, 1876, the rate was reduced to eight per cent., and by act of March 2, 1878, the rate was reduced to six per cent., which has since continued to be the legal rate. Bullitt & Feland's Stat., page 81, ed. of 1888.

So when the borrowing by the Baxters of defendant commenced ten per cent. per annum could by Kentucky law be stipulated for. While ten and eight per cent. were the legal rates, Defendant in Error did not charge any higher rate on its loans, but after six per cent. was fixed by law as the rate, eight and then seven per cent. was charged Baxter by the bank.

We suppose it will not be contended that the Kentucky Statutes on the subject of usury can be enforced in this action. It is to the United States Statutes that we can alone look.

McCullough vs. State of Maryland, 4 Wheaton, 306.
Osbourne vs. U. S. Bank, 9 Ibid., 738.
Veasie vs. Fennie, 8 Wall, 533.
Deering vs. National Bank, 91 U. S., 29.
Barnett vs. National Bank, 98 U. S., 555.

The Revised Statutes of the United States provides in Sec. 5197 that a National Bank may charge such rate of interest as allowed by the law of the State where the bank is, and no more, and may charge 7 per cent. where the State fixes no rate. Section 5198 then provides:

"The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representative, may recover back in an action in the nature of an action of debt twice the amount of the interest thus paid from the association taking or receiving the same;

provided such action is commenced within two years from the time the usurious transaction occurred."

The State Statutes then we assume must be laid out of view. The United States law is all we have to consider. It will be admitted the statute creates a new right or offense and prescribes a remedy, and we submit that it is well settled that where a statute creates a new right or offense and provides a specific remedy or punishment, they alone apply, and such provisions are exclusive. Such is the United States Statute against National Banks charging or receiving more than the State Statute allows.

Farmers' National Bank vs. Dearing, 91 U. S., 35.

Thompson's National Bank Cases, 117.

Barnett vs. Muncie National Bank, 98 U. S., 555.

The case of Driesback vs. Second National Bank, 104 U. S., 52, follows the Barnett case in enforcing the principles stated above. See also United States vs. National, 2 Dallas, 348, Kent's Com., Vol. 1, Sec. 16.

If State Courts assume or are permitted to enforce United States Statutes they are subject to the same limitations and restrictions as are the United States Courts in reference to such statutes.

The two sections above named are section 30 of the Act of June 3, 1864, and this section is a substitute for section 46 of the Original Act of February 25, 1863. We suppose it will be admitted that the two sections quoted, being in part highly penal in character, should not receive a construction beyond what is required by the plain letter of the law. This Honorable Court in the case of Tiffany vs. National Bank of Missouri, 18 Wall, 409, says: "In an action like the present to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a liberal construction. The defendant is not to be subjected to a penalty unless the words of the statute plainly impose it."

Again this Honorable Court in the case of Wheeler vs. National Bank, 96 U. S., 268, says: "Since the courts uniformly incline against the declaration of a forfeiture, the party seeking such declaration should be held to make convincing proof of every fact essential to forfeiture."

The Court will notice in the case at bar that the defendant bank has not sued to recover on its notes, but it is the borrowers by their trustee who seek to recover judgment for double the interest actually paid and also to have forfeited the illegal interest which he says the notes on their face bear, as well as such as have been incorporated in the notes by renewals, and to have credits put on these notes for these amounts.

We insist that under the U. S. Statute the borrower has given him a right of action for one purpose and one alone; that is to recover double the amount of the interest when it has been actually paid. He can in no other way get the benefit of the double interest penalty. Where the interest has not been paid we think it, under the decisions of this

Honorable Court, equally clear the borrower cannot have his action to have this unpaid interest declared forfeited. The statute gives no such right. As by the express provisions of the statute this illegal interest knowingly charged is forfeited, the borrower cannot be compelled by the bank to pay it, and his only remedy is when sued by the bank to rely on his forfeiture and restrict the recovery to the principle of the debt without the interest. We think the Barnett case before cited settles the law this way. We therefore think appellant's petition was good for the double interest but no farther, and the Trial Court and the Court of Appeals improperly held that the interest the notes bore on their face should be forfeited. We have no right to complain that the judgment for double the interest actually paid was rendered and affirmed. Again, the very gist, under the statute of appellant's right, consists in his not only alleging but furnishing convincing proof that the taking, receiving, reserving and charging interest greater than the State rate was "knowingly done." The whole forfeiture right rests on this, yet the plaintiff ~~neither alleges or~~ proves ~~anything~~ no of the kind. The two cases before cited of Tiffany vs. National Bank of Missouri, and that of Wheeler vs. National Bank and many other authorities that might be cited, so settle the law.

If appellant's action could be to have a forfeiture declared the plain reading of the statute excludes the idea, as we think, that where a National Bank charges more than the State rate of interest any part of the principal of the bill or note on which the interest was charged can be forfeited. It does not matter what goes to make up the principal of the bill or note, whether an actual sum of money loaned or such sums with accrued interest added thereon making a sum *in solido*, on which interest is to run. What the law forfeits is the interest which the note, bill or other evidence of debt carries with it. This plainly means the principal of the debt is not to be forfeited. What the statute forfeits is the interest which the note or bill carries. Interest is carried by the principal of the note or bill. When interest was renewed by adding it as principal in the new note it ceased to be interest borne or carried, but became principal that bore or carried interest. The principal of the note does the carrying of interest no matter of what the principal is composed. In the case of the First National Bank of Columbus vs. Carlinghouse, 22 Ohio State, page 492 (cited in 10 American Reports, p. 755), the court says:

"The forfeiture is expressly limited to the interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In thus limiting the forfeiture to the interest, the right of the bank to the principal is necessarily implied. The statute operates on the instrument given for the loan, and, in effect declaring it to be invalid as to the entire interest, but valid and binding as an obligation for the payment of the principal."

The Original National Bank Act of February 25, 1863, provides that the forfeiture should be of the entire debt or demand on which the interest was taken, reserved or charged. It is we think clear that the adoption of Sec. 30 in Act of June 3, 1864, was to confine the forfeiture to the interest in contra-distinction to the principal. The former only was to be affected.

Whatever Congress may have thought of the evils resulting from a National Bank charging more on its loans than the State rate of interest, it certainly thought, by requiring the party paying usury to sue for its recovery in two years, that the interest and rights of all parties required that that much diligence by the wronged party should be shown in asserting his rights. The matter should not become in the nature of a stale transaction. Now, to say if the borrower hands over the bank counter to the bank illegal interest on his loan he must sue for its recovery in two years or be barred, but if when his note matures he says to the bank, the interest I owe you on the note instead of my paying it to you in cash I will give you my note for it together with the amount of the old loan, he can sue for this interest so covered in the note five, ten or fifteen years after the transaction, we submit, is a distinction too refined and artificial for judicial action. If the amount of the illegal interest had been actually paid to the bank and at the same moment the bank had handed it back to the borrower and taken his note for it, certainly it would not be contended the two years' limitation would not apply.

Payment is what the parties agree shall be considered as payment. Peter vs. Beverly, 10 Peters, 568.

If the parties agree to it a note may be given in payment and satisfaction of a prior note. Harlan vs. Wingate's Adm'r, 2 J. J. Marsh (Ky.), 10 Johnson, 104.

We suppose this Honorable Court takes judicial notice of the ordinary business methods of transacting business in the country. In the banking business a renewal of a note is treated, acted on and understood by the parties as a satisfaction and payment of the bill or note renewed. The renewed note is canceled and handed to the borrower, or laid away in the cancel files of the bank. We believe it to be impossible to transact the banking business of the country in any other way. With reference to the laws of banking as stated we cite the court to:

Letcher vs. Bank of the Com., 1 Dana (Ky.), 82.

2 Parsons on Bills and Notes, Sec. 203.

Daniel in his work on Negotiable Instruments, Vol. 2, Sec. 1268, says that the agreement as to a renewal note paying the note renewed may be implied as well as expressed, and that all the circumstances may be looked into to ascertain what was the actual agreement of the parties.

Again we submit to this Honorable Court that there is a plain dis-

tinction between a provision in a statute that a contract for interest above a certain rate shall be void as to the whole interest contracted for, and a provision that the whole interest shall be forfeited. The United States Statute does not say the contract where usury is charged shall be void. Oats vs. First National Bank Montgomery, 100 U. S., 584, only that the entire reserved interest shall be forfeited when knowingly charged.

A forfeiture may be waived by the person in whose favor it is declared, and money paid upon a contract which the obligee might have resisted as forfeited should be presumed to have been paid because the person paying had elected to waive the forfeiture. Gist, &c., vs. Smith, 78 Kentucky Reports, p. 370.

When Baxter's notes from time to time fell due he could without any renewal have paid or offered to pay them less the reserved interest, or could have waited until the bank sued him and then claimed the forfeiture. Instead of insisting on his forfeiture Baxter pays this interest, or does what is equivalent to it, renews his notes from year to year. The forfeiture provision in the statute is evidently for the benefit of the borrower for his protection. It is a very stringent statute against the bank. The borrower may waive the forfeiture if he chooses.

Here in the case at bar Appellants in Error, the Baxters, have for a series of years done acts, freely and voluntarily, utterly inconsistent with their intention to insist on forfeiture. We think they should now be silent. Policy, justice, and as we think, good morality, demands that where a party intends to insist on his forfeiture, he should not double deal about it. If he acts equivocally he should not have the countenance and help of courts of justice.

We respectfully submit that the judgment of the Court of Appeals is more favorable to appellant than it should have been. He was not entitled to any forfeiture at all.

W. J. LISLE,
Attorney for Defendant in Error.

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U. S. Statutes, Secs. 5197 and 5198.